Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

TDC MANAGEMENT CORPORATION, INC.
and T. CONRAD MONTS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

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(D.D.C. 3/29/00)(Memorandum & Order) 1a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 89-1533 (JGP)

TDC MANAGEMENT CORPORATION &
T. CONRAD MONTS,

Defendants.

MEMORANDUM

This matter is before the Court on plaintiff's motion for summary judgment. Plaintiff, the United States of America, brings this action under the False Claims Act ("the Act"), 31 U.S.C. § 3729. For the reasons set forth below, plaintiff's motion for summary judgment is granted.

BACKGROUND

TDC Management Corporation ("TDC") and the Urban Mass Transportation Authority ("UMTA")[1] entered into contract DTUM60-83-C-72107 ("Contract I") which called for TDC to develop a model bonding program to aid minority business enterprises ("MBEs") in gaining adequate bonding.[2] The contract listed specific steps TDC was to take in developing the model bonding program.[3] The statement of work in Contract DTUM60-83-C-72207 ("Contract II"), entered into by TDC and UMTA for the implementation of the actual bonding program ("Program"), was based on the model bonding program produced under Contract I. Under the terms of the contract, TDC was to serve as Program Manager of the bonding program.[4]

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[1] Subsequent to the commencement of this action, UMTA was renamed the Federal Transit Administration.

[2] The bonding program in question was initiated to address the problem of insubstantial minority business participation in federally-funded mass transportation construction projects because of a lack of adequate bonding. UMTA is authorized to provide financial assistance for programs designed to increase minority participation in public transportation activities, and to assist minority businesses in obtaining surety bonding.

[3] See generally Opinion of the Department of Transportation Board of Contract Appeals ("DOTBCA Opinion") at ¶ 3 (attached to Plaintiff's Motion for Summary Judgment (filed Aug. 16, 1996))(describing Task V of the model bonding program).

[4] TDC's report on its model bonding program helped define the responsibilities it would eventually have as Program Manager. "The program manager (TDC) would have six functions: (1) to locate participants and to develop program format; (2) to coordinate the program to assure that all participants acted in accordance with their agreements; (3) to provide technical assistance to transit authorities; (4) to ensure that disadvantaged business enterprises were not unfairly utilized by any participant; (5) to act as ombudsman for UMTA; (6) to document the program. Expanding upon (4), the report notes that transit

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit") has summarized the history of this dispute including details of TDC's performance of its contractual obligation, the eventual termination of the contract by UMTA, proceedings before the Department of Transportation Board of Contract Appeals ("DOTBCA" or "the Board"), proceedings in this Court and the appeal of this Court's previous granting of summary judgment to TDC.

> Pursuant to its contract with UMTA, TDC submitted monthly progress and expenditure reports to UMTA. UMTA reimbursed TDC monthly for documented expenditures. The government claims that TDC's reports overstated its progress in attracting investors and failed to disclose that, contrary to the Program design, TDC sought to obtain a financial interest in Program operations. The government claims that UMTA would not have made payments to TDC had it been aware of either of these facts.
>
> UMTA first learned of TDC's alleged misrepresentations in December 1984. On April 5, 1985, it issued a termination for convenience. UMTA had, to that point, paid TDC $747,944 for contract-related expenditures. On June 1, 1985, TDC

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authorities might have larger opportunities which would require the investor to assume a greater role to the detriment of the participating disadvantaged business enterprise, and therefore the program manager would have to be wary to assure that the disadvantaged business enterprise was not unfairly treated. Expanding upon (5), the report noted that an ombudsman, defined as 'an objective person who investigates complaints,' would serve as a mediator among participants to assure resolution of controversies which might develop. 'It is most critical to the success of the demonstration program that the program manager have ombudsman ability .... The program manager should not have any financial risk.'" DOTBCA Opinion at ¶ 8(f).

submitted a termination settlement proposal seeking an additional $216,133 in contract reimbursements. In May 1986, a UMTA contracting officer held that only $486,944 of the total $928,916 claimed by TDC over the life of the contract were "allowable, allocable, and reasonable." The officer categorically disallowed TDC's undocumented travel costs, computer costs, excessive per diem charges, cost overruns, and costs associated with TDC's Los Angeles office. The officer requested that TDC reimburse UMTA for the $261,615 overpayment that TDC had already received.

TDC appealed the contracting officer's decision to DOTBCA, claiming that it was entitled to an additional $143,852 in cost-reimbursements from UMTA plus $9,830 in termination costs. UMTA raised three affirmative defenses to TDC's claims: (1) TDC failed to perform the tasks in the contract statement of work; (2) TDC obtained the contract "by fraud and misrepresentation"; and (3) TDC "perpetrated frauds ... in presenting vouchers for payment of costs claimed" under the contract. UMTA also filed a counterclaim, grounded in restitution and breach of contract, seeking recovery of all contract payments already made to TDC.

Pursuant to the Contract Dispute Act of 1978, 41 U.S.C. § 605, the Board held that its jurisdiction extended only to those costs that the contracting officer had disallowed. As such, the Board would not consider UMTA's claim that TDC was not entitled to any monies under the contract. Nonetheless, the Board would consider "any applicable reason for disallowance [of costs the contracting officer denied] regardless of whether or not such reason was stated in the Contracting Officer's decision."

On October 15, 1987, the government moved to suspend DOTBCA's contract dispute proceeding pending conclusion of a Department of Justice criminal investigation into possible fraud charges against TDC. DOTBCA granted this motion and stayed its proceedings until February 1, 1988. The government ultimately declined to file criminal fraud charges against TDC but, on May 26, 1989, it filed a civil action under the False Claims Act and the common law alleging that TDC knowingly submitted false progress reports to UMTA. The government claimed that TDC's monthly progress reports misrepresented its actual progress in attracting investors and sureties willing to participate in the Demonstration Bonding Program and concealed TDC's substantial deviations from agreed-upon Program terms.

Claiming that DOTBCA lacked jurisdiction to hear cases involving issues of fraud, the government moved to suspend the Board's contract dispute proceedings until the conclusion of the government's civil suit against TDC. The Board recognized that its jurisdiction, as defined by the Contract Dispute Act of 1978, did not extend to "settl[ing], compromis[ing], pay[ing] or otherwise adjust[ing] any claim involving fraud." 41 U.S.C. § 605(a). Nonetheless, the Board denied the government's motion and announced that it would "proceed in accordance with its statutory jurisdiction, to ascertain the amounts of costs incurred which were allocable to [the] contract and were reasonable." The Board recognized that this determination "may well have collateral effect beyond the categories of costs addressed in the Contracting Officer's decision." Nonetheless, the Board assumed that the district court

would "proceed in accordance with its statutory jurisdiction to ascertain whether TDC willfully submitted false progress reports."

After an administrative trial, the Board invalidated UMTA's categorical cost disallowances of TDC's reimbursement claims finding that TDC's monthly progress reports had notified UMTA of the very categories and types of expenditures that UMTA later sought to disallow. In addition, the Board held that TDC had not breached its contract through nondelivery of the end product. The United States Court of Appeals for the Federal Circuit affirmed the Board's ruling. Skinner v. TDC Management Corp., 975 F.2d 869 (Fed. Cir. 1992). Based on the collateral estoppel effect of the Board's decision, TDC moved for summary judgment in the government's False Claims Act ease against TDC. The district court granted TDC's motion and [an] appeal followed.

United States v. TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. 286, 288-89, 24 F.3d 292, 294-95 (1994).

In its review of this Court's grant of summary judgment to TDC, the D.C. Circuit affirmed in part and reversed in part this Court's determinations as to the collateral effect of the DOTBCA proceedings on the government's False Claims Act claims, and modified the standard set out by this Court for articulating a claim under the Act. As to the collateral effect of the DOTBCA proceedings, the D.C. Circuit affirmed this Court's grant of summary judgment to TDC with regards to the breach of contract (by allegedly overstating its progress) claim DOTBCA reviewed. Collateral estoppel applied "[b]ecause the Board implicitly found that TDC's monthly reports

accurately reflected TDC's Program progress." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 290, 24 F.3d at 296.

However, the D.C. Circuit reversed in part, stating that "DOTBCA's determination that UMTA tacitly assented to the activities and expenditures *contained* in TDC's monthly reports does not collaterally estop the government from bringing a False Claims Act claim based on information TDC *omitted* from those reports." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 290, 24 F.3d at 296 (original emphasis). Thus, while collateral estoppel prevented the government from bringing a False Claims Act claim based on false information contained in the progress reports, the government could bring such a claim based on material information TDC failed to include in those reports, such as TDC's alleged attempts to gain a financial interest in Program operations.

As for the standard this Court is to use in evaluating the government's False Claims Act claim against TDC, the D.C. Circuit, in relevant part, held that

> [t]o prevail under the False Claims Act, the government must prove either that TDC actually knew it had omitted material information from its monthly progress reports or that it recklessly disregarded or deliberately ignored that possibility. The government need not prove that TDC intended to deceive the government by omitting such information.
>
> TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 292, 24 F.3d 292 at 298.

Finally, the D.C. Circuit concluded that the Act's civil penalty and treble damages provisions added in the 1986 amendment to the Act did not apply retroactively to the government's claim against TDC. Rather, "the civil penalty

and double damages provisions of 31 U.S.C. § 3729 (1982) govern any damage award that ensues from the government's False Claims Act suit against TDC. Any such damage awarded would merely offset the payments to which the Board of Contract Appeals has already determined TDC is entitled under the terms of its UMTA Contract." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 292, 24 F.3d 292 at 298.

The case was then remanded to this Court for resolution of the government's False Claims Act claim based on omissions from progress reports filed in support of TDC's payment requests, in accordance with the D.C. Circuit's opinion. Presently before the Court is the government's motion for summary judgment.

DISCUSSION

According to Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

A. Collateral Estoppel Effect of Factual Findings Made by DOTBCA

In order for the government to prevail, it must first show that there are no genuine issues of material fact. The government's answer to this burden is that none of the material facts important to its False Claims Act claim are at issue because DOTBCA has already issued findings of fact which are binding on this Court. See Plaintiff's Motion for Summary Judgment at 3-5. The government points to several instances identified by DOTBCA of factual

omissions from the progress reports filed by TDC, along with DOTBCA's conclusion that those omissions were intentionally designed to avoid a rebuke from UMTA. As the government notes, collateral estoppel prevents this Court from revisiting factual determinations made by DOTBCA. See Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1995)("Under the doctrine of collateral estoppel, ... a judgment ['on the merits'] precluded relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.").

In its opposition to the government's motion for summary judg nent, TDC fails to address, let alone dispute, the collateral estoppel effect of the DOTBCA opinion with regards to omissions from its monthly reports to UMTA. Instead, TDC suggests that the False Claims Act claim based on omissions is a new claim which requires further discovery. The Court cannot agree with TDC's assessment. As the government points out in its reply, the complaint is replete with references to omitted information. See Plaintiff's Reply to Opposition of Defendants to Plaintiff's Motion for Summary Judgment ("Plaintiff Reply")(filed Dec. 31, 1996) at 3-4. Furthermore, the very remand from the D.C. Circuit to this Court was based on the omission-oriented False Claims Act claims filed by the government. Finally, the issue of omissions was squarely addressed by the Board in its prior review of the contract termination.

The Court concludes that collateral estoppel prevents TDC from relitigating factual issues settled by the Board with regards to omissions. Before evaluating whether these factual findings are sufficient to support the government's False Claims Act claim, the Court will summarize the Board's findings regarding instances of TDC's failure to disclose material information to UMTA.

1. Dealings with Equitable Life Assurance Society

TDC's dealings with Equitable Life Assurance Society ("Equitable"), another potential investor in the Program, further highlight instances in which TDC omitted material information from its reports to UMTA. On December 12, 1983, TDC sent a formal proposal to Equitable soliciting its participation in the Program. TDC failed to furnish UMTA with a copy of this proposal when it made progress reports on the negotiations with Equitable.[5] See DOTBCA Opinion at ¶ 64. Inter alia, the proposal recommended:

(1) Creation of a loss reserve of $6,000,000 by equal contributions from "UMTA and a private investor(s)"[sic], upon which a surety would make available a bonding line of credit of $60,000,000.

(2) The loss reserve would become the capital of a new corporation, which at the time the surety issued bonds would itself issue a letter of credit to the surety in an amount equal to 10% of the bond face value.

(3) The new corporation would itself join venture with disadvantaged business enterprises to perform the construction, taking a maximum of 49% of the profits.

(4) UMTA would not share in any profits of the corporation.

(5) TDC would be "most happy" to serve Equitable by providing management

[5] The first progress report submitted by TDC after the December 12, 1983 proposal to Equitable was dated January 4, 1984. DOTBCA Opinion at ¶ 122.

> assistance to the disadvantaged business enterprises.

DOTBCA Opinion at ¶ 64.

As the Board specifically concluded, the "use of the UMTA contribution as capital for a new corporation was contrary to the change in the Demonstration Bonding Program made at UMTA's instance." Id. Furthermore, TDC made a more formal proposal to Equitable on July 26, 1984, which added terms calling for the $6,000,000 in the bonding security pool to be invested in interest-accruing accounts, and allowing the investment entity to earn a 3% construction management fee. See DOTBCA Opinion at ¶ 65. DOTBCA noted that "nowhere in the Demonstration Bonding Program was there any indication that the investor or any other participant could earn construction management fees. Id. TDC and Equitable did not reach final agreement on participation, and it was "not until long after the termination that UMTA obtained a copy [of TDC's proposal] from Equitable." Id.

It should also be noted that TDC's offer to provide management assistance to the Program participants conflicted with its duties as Program Manager. As the Board noted, "participating disadvantaged business enterprises would require technical assistance, but this would not come from the program manager." DOTBCA Opinion at ¶ 13(f). TDC withheld from UMTA information about its intentions to provide management assistance to Program participants. The Board noted potential motivation omitting information about his deviation from the Program specifications.

> The Demonstration Bonding Program called for management assistance to be provided to participating disadvantaged business enterprises, primarily by the investor with possibly some

> assistance by the surety, but certainly for none to be provided by the Project Manager (TDC). (Finding 13). Nowhere did the Program call for the provision of such assistance to be funded, directly or indirectly, by UMTA. Thus, to the extent that TDC was planning on utilizing the interest generated by short-term investment of the UMTA contribution to underwrite costs of providing such assistance, it was departing from the terms of the Demonstration Bonding Program.
>
> In addition, TDC was proposing to investors that the disadvantaged business enterprises be charged a 3% fee for management services. (See Finding 65). To the extent that TDC was planning to charge disadvantaged business enterprises in order to underwrite the costs of providing this management assistance, it was also departing from the Demonstration Bonding Program, as well as seeking to obtain profits for itself.

DOTBCA Opinion at 108-09.

2. Dealings with New York Life Insurance Company

As previously stated, Contract II required TDC to act as ombudsman for UMTA in administration of the Program. DOTBCA Opinion at ¶ 8(f). The government points to several instances in the record which indicate that TDC fully understood that its role as Program Manager included the responsibility of acting as ombudsman for the various program participants, and that in order for it to effectively execute its ombudsman duties, it would have to avoid any conflicts of interest, including having any financial stake in Program operations. See DOTBCA Opinion at ¶¶ 8(f), 29(k), 79(b); see also DOTBCA Opinion at 125-26.

In its opinion, DOTBCA repeatedly chastised TDC for failing to disclose to UMTA its plans to hold a financial stake in Program operations. DOTBCA highlighted TDC's dealings with New York Life Insurance Company ("New York Life") as an example of this deficiency. In 1984 TDC began approaching several insurance companies, including New York Life, to solicit participation in the Program. DOTBCA found that "at some point prior to October, 1984, TDC was aware that New York Life wished TDC to have a financial interest in the Program. At this juncture, TDC should have made mention of this in a periodic progress report [to UMTA]." DOTBCA Opinion at 126.

Not only did TDC fail to notify UMTA that New York Life preferred TDC to have a financial stake in the Program, TDC went on to propose such an arrangement to New York Life through its director and officer T. Conrad Monts. As DOTBCA found, TDC sent New York Life a "Draft Deal Memorandum" which stated that "investment will total Three Million Dollars ($3,000,000) contributed 90% by New York Life Insurance Company and other investors (the insurance companies) and 10% by TDC Management Corporation." DOTBCA Opinion at ¶ 68. DOTBCA noted that each participant's investment would be a combination of debt and equity, with each investor receiving stock in return for its investment.[6] This arrangement contradicted the requirements of both the Program and the contract. See DOTBCA Opinion at ¶ 13(h).

In its report to UMTA regarding interactions with New York Life, TDC failed to mention anything regarding its plans to invest in the Program. As the Board found, TDC described its negotiations with New York Life in detail in its October 1984 report, but "did not furnish to UMTA a copy

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[6] For a more detailed explanation of the investment plan, including stock distributions, see DOTBCA Opinion at ¶¶ 68-69.

of the private placement memorandum, which would have revealed that TDC was to have an equity interest in the Demonstration Bonding Program." DOTBCA Opinion at ¶ 82(d). The Board concluded:

> "[g]iven its recognition of the need to avoid organizational conflicts of interest, one is compelled to conclude that [TDC's] silence was intentional, to avoid a direction from UMTA that it not participate. Given TDC's repeated statements in divers submittals of the program manager's monitoring function, one can only conclude that TDC's silence in not informing UMTA of New York Life's wishes in the matter was either intentional or was at best grossly negligent. In either event, the result is the same.
>
> Under the Demonstration Bonding Program as drafted by TDC and as embodied in [Contract II], for TDC to simultaneously hold positions as program manager and (partial) investor would be to place it in a position where it could not objectively carry out its functions as program manager. It could not objectively monitor the relationship between investor (itself) and disadvantaged business enterprise; it would be a judge in its own cause. This would be a classic organizational conflict of interest.

DOBTCA Opinion at 126.[7]

3. Transit Sureties, Inc.

At some point during its implementation of the Program, TDC determined to form Transit Sureties, Inc. ("Transit Sureties"), a distinct corporate entity to engage in joint ventures with the disadvantaged business enterprises, in order to shield UMTA and other private investors from liability. DOTBCA previously concluded that using a separate corporation to joint venture with the disadvantaged business enterprise did not depart from the terms of the Program. The Board concluded that such an arrangement was "the most legally logical vehicle for investor participation to assure adequate insulation from liability. Nothing in the Demonstration Bonding Program precluded the incorporation of Transit Securities, Inc." DOTBCA Opinion at 111.

Although the terms of the Program were not violated by the incorporation of Transit Sureties, the Board noted that problems arose with how TDC chose to finance and organize the new corporation. For example, the Board specifically found that

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[7] An additional summary of the various omissions made in report to UMTA regarding negotiations with potential investors, including Equitable and New York Life, can be found in the DOTBCA Opinion. The summary includes omissions regarding TDC's role as an investor. TDC's use of UMTA's financial contribution as capital for its new corporation (Transit Sureties, Inc.), UMTA's legal relationship with investors through the new corporation, and TDC's plans to provide technical assistance to the disadvantaged business enterprises. See DOTBCA Opinion at ¶ 79. The Court also notes that the record from the Board is clear that TDC was not particularly forthcoming in providing UMTA with copies of the proposals made to New York Life and Equitable. See DOTBCA Opinion at ¶¶ 65, 82(d).

UMTA did not want its [$3,000,000] contribution [to the Program] used as capital for [the] corporation. In comments on TDC's proposed Demonstration Bonding Program under the first contract, UMTA had made this clear, and that the contribution was to be used only as a reserve. (Finding 11(d) and (f)). Nevertheless, TDC proposed to Equitable Life Assurance Society, a potential investor, that UMTA's contribution would become part of the capital of Transit Sureties, Inc. (Finding 64).

As noted in Findings 67-69, TDC was structuring Transit Sureties, Inc. in such a manner that 90% of the $3,000,000 private investment would be in the form of a loan to the corporation rather than a contribution to equity capital. One effect would be to guarantee the private investor a gross return of 13-$^1/_2$% on its investment, since payment of interest owed would be one of Transit Sureties, Inc.'s primary obligations. Only if there were a complete failure of the Program, with massive defaults, would the investors lose their principal. As the Board views the contemplated transaction the result would be that through the use of

> UMTA's contribution and a loan from the investors, TDC would eventually own Transit Sureties. The corporate structure of Transit Sureties, Inc. is not consistent with the purpose and structure of the Demonstration Bonding Program.

DOTBCA Opinion at 111-12.

Furthermore, the Board was plainly critical of TDC's intended relationship with the new corporation. As the Board noted,

> TDC went further, organizing Transit Sureties, Inc. in such a manner as to assure that TDC would eventually control that corporation (Findings 67 and 68), by then expected to be profitable, and arranging to charge the disadvantaged business enterprises a 3% management fee. If this plan had carried through to fruition, then no longer could TDC act objectively in performing its ombudsman/program manager functions and no longer could TDC objectively perform its Task X (Finding 48) functions of ensuring that all participants were acting properly and that participating disadvantaged business enterprises were not being unfairly treated.
>
> Upon reviewing all the contemporaneous documents

> in the record, the Board concludes that this omission of information from the reports (to UMTA) was intentional.

DOTBCA Opinion at 24.

4. Omissions Regarding General Management of the Program

TDC's dealings with New York Life, Equitable and Transit Sureties clearly demonstrate a pattern of omitting from progress reports information which would have revealed to UMTA that some of TDC's practices were variations from the intended Program. While concluding that the omissions were not legitimate grounds for UMTA to terminate the contract for convenience, the Board openly speculated about whether the omissions could constitute fraud. As the Board noted, none of the progress reports advised UMTA:

> (1) that TDC or Mr. Monts was to participate as an investor (Finding 66);
>
> (2) that TDC intended to use interest generated by the security pool to fund TDC furnishing technical assistance to the disadvantaged business enterprises, a function which in the Program was to be performed by the sureties or the investors;
>
> (3) that TDC would provide management service to the disadvantaged business enterprises (Finding 64);
>
> (4) that disadvantaged business enterprises would be charged a 3% management fee (Finding 65);
>
> (5) that UMTA's contribution would be used as part of capitalization of Transit Sureties, Inc., despite the direct statement to the contrary in the Report on

> Subtasks C, D, and E developed under the earlier contract (Finding 7);
>
> (6) that the stock structure of Transit Sureties, Inc. was intended to allow TDC to eventually emerge in control of the company (Findings 68 and 69).
>
> Significantly, most of these omissions were variations which could or would result in an enhanced or newly created opportunity for TDC or Mr. Monts to derive profits from the Demonstration Bonding Program. Reviewing all the contemporaneous documents inescapably leads to the conclusion that these omissions were intentional omissions, intended to keep UMTA from learning of activities which UMTA would insist be terminated.

DOTBCA Opinion at 130.

B. The Government's False Claims Act Claims

To establish a claim under the False Claims Act, the government must establish that TDC "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729. To establish the knowledge element, the D.C. Circuit has held that the government must show that the material omissions were either intentional or resulted from reckless disregard. Furthermore, the government need not establish that TDC actually intended to deceive the government by omitting the pertinent information.

Considering the factual determinations made by the Board, the Court is able to conclude that the government has established that the omissions were either intentional or resulted from reckless disregard. As the Board itself noted, at least one of TDC's omissions was calculated to avoid a

directive from UMTA to cease activities which would have given TDC a financial stake in Program operations. See DOTBCA Opinion at 130. In any event, omissions relating to the plethora of variations from the Program discussed above clearly resulted form TDC's reckless disregard of UMTA's interest in keeping abreast of all material Program developments, particularly those relating to the Program Manager's ability to carry out its role according to the terms of the contract. The omissions clearly had the effect of leading UMTA to conclude that the Program was making progress in accordance with established guidelines. The omissions thus made the progress reports in question false. Since the progress reports were offered by TDC in support of invoices for payment under the contract, the government has met its burden of proof to establish its False Claims Act claim.

The parties argue over whether the omissions were actually material, meaning that UMTA would not have continued payments to TDC but for its ignorance of the omitted information. The government points out that the False Claims Act does not "expressly require the United States to prove that a claim is false in a 'material' respect." Plaintiff's Motion for Summary Judgment at 22. However, TDC replies to this by pointing out that the D.C. Circuit required that

> [to] prevail under the False Claims Act, the government must prove that either TDC actually knew it had omitted material information from its monthly progress reports or that it recklessly disregarded or deliberately ignored that possibility.

TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298 (emphasis added).

Regardless of whether the materiality of the omissions is a required element of the government's case, the Court concludes that the omissions were indeed material, meaning that had UMTA known about the omitted information, it would have either required TDC to terminate certain activities or terminated the contract for cause. This conclusion is supported not only by the DOTBCA Opinion,[8] but by the affidavits submitted by the government in support of its motion for summary judgment as well, which the Court is free to consider pursuant to Federal Rule of Civil Procedure 56(c). See, e.g., Declaration of Ralph L. Stanley in Support of Plaintiff's Motion for Summary Judgment ("Stanley Decl.") at ¶¶ 3-6 ("If I had known that TDC, or Monts, had tried to obtain an equity interest or other financial interest in the demonstration bonding program without notification to UMTA, I would have directed that the contract be immediately terminated for cause."[9]

C. Damages

Having found that TDC is liable under the False Claims Act for the omissions in its progress reports to UMTA, beginning with the progress report dated January 4, 1984, pertaining to TDC's dealings with Equitable, the Court now turns to the issue of damages. As the D.C. Circuit held, this Court is to use the damages formula set out in 31 U.S.C. § 3729 (1982). See TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298. That section provides that damages for a violation of the False Claims Act can include a civil penalty of $2,000 per false claim, an amount equal to 2 times the amount of damages the Government sustains because of the false claim, and costs of the civil action.

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[8] See DOTBCA Opinion at 108-09, 124, 130.

[9] Ralph L. Stanley served as Administrator of the Urban Mass Transit Administration from November 21, 1983 to May 31, 1987. Stanley Decl. at ¶ 1.

Finally, the Court notes, as did the D.C. Circuit, that any damages awarded to the government from this suit shall offset damages owed to TDC by the government pursuant to DOTBCA's review of the contract termination. See TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298.

Before issuing a final order on the issue of damages, the Court requires more specific information from the parties regarding the calculation of damages. Therefore, the United States shall have until June , 2000, to provide the Court with a detailed calculation of the damages, penalties, interest, and costs it is entitled to. This calculation should also specify the amount owed to TDC under the terms of the DOTBCA Opinion. TDC shall then have until June 30, 2000, to file a response to the government's proposed calculation of damages. The government shall then have until July 14, 2000, to file an appropriate reply. Notwithstanding the establishment of this briefing schedule with regards to the issue of damages, the Court encourages the United States and TDC to attempt to settle the issue of damages.

CONCLUSION

For the reasons contained in this memorandum, plaintiff's motion for summary judgment is granted as to TDC's liability under the False Claims Act. An appropriate order accompanies this memorandum.

Date: March 29, 2000

S/J. Penn U.S. District Judge

JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 89-1533 (JGP)

TDC MANAGEMENT CORPORATION &
T. CONRAD MONTS,

Defendants.

ORDER

This matter is before the Court on plaintiff's motion for summary judgment. For the reasons set forth in the accompanying Memorandum, it is hereby

ORDERED that plaintiff's motion for summary judgment [#140] is granted as to TDC's liability; and it is further

ORDERED that the United States shall have until June 1, 2000, to provide the Court with a detailed calculation of the damages, penalties, interest, and costs it is entitled to, which should also specify the amount owed to TDC pursuant to the March 5, 1991 judgment of the Department of Transportation Board of Contract Appeals; and it is further

ORDERED that TDC shall then have until June 30, 2000, to file a response to the government's proposed calculation of damages, and it is further

ORDERED that the government shall then have until July 14, 2000, to file an appropriate reply.

Date: March 29, 2000

S/J. Penn U.S. District Judge

JOHN GARRETT PENN
United States District Judge